United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1267

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1267

UNITED STATES OF AMERICA,
Appellant,

—against—

GERARD P. TROTTA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING IN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules:

Articles:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PETITION FOR REHEARING
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Preliminary Statement

This Petition for rehearing and suggestion for rehearing in banc is submitted on the basis of the exceptional importance of the issues involved. Defendant-appellee submits that the panel of this Court has misapprehended questions of law and that rehearing of the case by this Court as a whole is vitally needed. (Rule 40 and Rule 35, Federal Rules of Appellate Procedure).

Judge Neaher's opinion was reported. United States v. Trotta, 396 F. Supp. 755 (E.D.N.Y. 1975). The opinion of a panel of this Court, reversing Judge Neaher, was decided on November 10, 1975, Slip Op. No. 289, pp. 473-481.

The panel adopted the Government's view and held that "a specific identifiable misuse of office" need not be alleged in the indictment and that an office holder's use or abuse of his office "is not an essential element of the crime" (Hobbs Act "under color of official right", 18 U.S.C. 1951 (b) (2)) (Slip Op., pp. 480-481). In the panel's holding that no misuse of office need be involved, the panel has departed from every other Hobbs Act precedent throughout the land. Although the panel has quoted some language from United States v. Braasch, 505 F.2d 139, 151 (7 Cir. 1974), cert denied 421 U.S. 910 (1975) and United States v. Kenny, 462 F.2d 1205, 1229 (3 Cir. 1972) cert denied 409 U.S. 914 (1972) (Slip Op., pp. 479-480), an examination of those cases as well as of every case cited by Judge Neaher, the Government and defendant-appellee, establishes that in each of them (1) the defendant was a public official who had certain official power; (2) a payment was made to the defendant-official; and (3) there was a specific identifiable misuse by the defendant of his office. (A survey of the cases is presented in defendant-appellee's brief at pages 21-26).

This case appears to be the first Hobbs Act case to be decided in the Second Circuit involving the common law aspect of the Act. Judge Stern brought the common law aspect of the Act to life in his article entitled Prosecution of Local Political Corruption under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 Seton Hall Law Rev. 1 (Fall 1971),

written when he was a Federal prosecutor involved in United States v. Addonizio, 451 F.2d 49 (3 Cir. 1972) and United States v. Kenny, supra. The Stern article has produced a domino effect. From the Third Circuit the "under color of official right" concept moved to the Seventh Circuit -- [United States v. DeMet, 486 F.2d 816, (7 Cir. 1973); United States v. Staszcuk, 502 F.2d 875 (7 Cir. 1974) rev'd in part on other grounds en banc, 517 F.2d 53 (1975); United States v. Irali, 503 F.2d 1295 (7 Cir. 1974); United States v. Crowley, 504 F.2d 992 (7 Cir. 1974); United States v. Braasch, 505 F.2d 139 (7 Cir. 1974)] -- and thence to the Fourth Circuit [United States v. Price, 507 F.2d 1349 (4 Cir. 1974)]; and thence to the Pennsylvania District within the Third Circuit [United States v. Mazzei, ___F.2d ____ (3 Cir. July 29, 1975) (No. 75-1357); and now, as indicated, United States v. Trotta, supra, appears to be the first Second Circuit case to consider the common law branch of the Hobbs Act.

II.

The panel held that the fact that the checks went to the Republican Committee rather than to Mr. Trotta "does not lessen Trotta's culpability under the statute" (Slip Op., p.475, note 2) citing United States v. Green, 350 U.S. 415, 420 (1956), which had been cited along with other cases in the Government's main brief, page 4. The Government had argued, and the panel

accepted the argument that it did not matter whether the contribution was given to the official or to a third party (Govt. Brief, p.4).

Petitioner submits that the Government has led the panel to misapprehend the law and to announce bad law. None of the cases cited by the Government (Govt. Brief, p.4) or by the panel (Slip Op., p. 475, note 2) -- [United States v. Green, 350 U.S. 415 (1956); United States v. Sweeney, 262 F.2d 273 (C.A. 3); United States v. Provenzaro, 334 F.2d 678 (C.A. 3, 1964), cert. denied, 379 U.S. 947 (1964); United States v. Jacobs, 451 F.2d 530 (C.A. 5, 1971), cert. denied, 405 U.S. 955 (1972)] -- involved the "under color of official right" branch of the Hobbs Act (18 U.S.C. 1951 (b) (2)). Each of those cases involved the traditional "force, violence, or fear" aspect of the Hobbs Act.

Extortion "under color of official right" (common law extortion), as the panel observed, can only be committed by a public official (Slip Op., p. 479, note 7). The essence of common law extortion is the receipt of an "unlawful fee". This indictment does not charge an "unlawful fee". Cosulich's contributions, both of which were made by check, were made and paid to the Republican Committee which got the entire benefit of the proceeds, with not a cent which is claimed to have gone to Mr. Trotta.

No case anywhere in the nation has extended the common law aspect of the Hobbs Act to a situation where contributions were given to a political party, and not to the accused. In extortion "under color of official right", the public official holds out to the victim that he is entitled to a sum of money as a fee or a part of his salary to which his office entitles him. (Defendant-appellee's brief, pp. 10-12). By the very terms of the indictment, however, Cosulich was given to believe, not that Mr. Trotta was receiving any money, but that Cosulich was giving to the Republican Committee. Defendant-appellee pointed out to the panel both in his brief (e.g. pp. 10-12) and in counsel's letter to the panel dated October 2, 1975, page 1, paragraph 2, that the indictment failed to allege that Trotta gave Consulich to believe that he, Trotta, was seeking a "fee" or emolument for himself, or that Cosulich so understood, or that Cosulich's checks to the party were given as fee or salary to Trotta. We do not dispute that where a public official, commits extortion by "force, violence, or fear", the money may go to a third party. On the other hand, in the case of extortion "under color of official right", the very essence of the crime involves an "unlawful fee" -- a holding out to the payor of the money that

the solicitor-public official is claiming the money as a fee, that is, as a part of his salary or other official compensation.*/

III.

Judge Neaher clearly grasped what the panel may have dimmed an awareness of, namely, how the Government intends to apply the Hobbs Act. It is the Government's view that a public official who can affect another (who is aware that he may be so affected), commits extortion by the mere solicitation of funds for any cause. The Government claims that the mere solicitation makes out a prima facie Hobbs Act violation. (United States v. Trotta, 396 F. Supp. 755, 758 (E.D.N.Y. 1975)).

*/ Every single case cited by the Government, defendant-appellee, Judge Neaher, and the panel, fits this pattern. The case of United States v. Mazzei, supra, also fits the pattern. The indictment alleged that Mazzei sought and obtained more than $8,000 from the B.M.I. firm. The proof at trial was that Mazzei told B.M.I. officials that the money was for a political fund, however, as the briefs in that case make clear, the Government was prepared to show that the money went to Mazzei himself. Mazzei didn't want to take the stand unless the court were willing to give him a protective ruling in advance, barring the Government from asking him about where the money went. When the District Court Judge refused to give the protective ruling, Mazzei chose not to take the stand.

The panel has either failed to grasp that that is the Government's approach, or it has intentionally decided to place its seal of approval upon that approach.*/

In thus going beyond the high water mark of every Hobbs Act decision heretofore reported, the panel has created an explosive expansion of Hobbs Act coverage. If the Court allows the panel holding to stand, it licenses the indictment of any person who holds public office who solicits money for any cause from another person over whom he holds power. The Government says that the power that the soliciter could potentially wield makes the solicitation extortionate as a matter of the law.**/ Thus, it makes no difference why the one who asks for the money does so; it makes no difference if the request is official or not; it makes no difference if the appeal for funds is made during business hours or not, and no difference as to what cause is being aided. The potential to hurt the person approached is enough, according to the view of the Government and the panel.

We submit that the issue is one of exceptional importance because persons holding public office, both today and from time immemorial, have been and are involved in other community activities. They serve on the boards of charities, political

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*/ It is probably the latter by virtue of the panel's apparent holding that even the receipt by the Republican Party of the contribution, as opposed to the defendant's receipt of the money, spells out a violation and that a use or abuse of the public office is not a required element of the crime (Slip Op., p. 475, note 2 and p. 481).

**/ ". . .a demand for monies made by one holding a public office, from a citizen who could be affected directly and adversely by the manner in which the public officer exercises his official functions, is inherently coercive" (Govt's main brief, p.3).

parties, and other community institutions, and in the field of fund raising, political and other community groups are **frequently** recruiting public officials to raise money. We call attention to the exemplars which defendant-appellee has appended to the end of his brief, from such persons as the Vice-President of the United States (on official letterhead), from the District Attorney of Kings County (on official letterhead), and in connection with a number of judicial appeals for funds, etc. (See also exemplar sent to the panel with our letter dated October 2, 1975). Under the holding of the panel, each of those persons could be indicted for violating the Hobbs Act. We submit that the holding was never contemplated by the Congress, that it is dangerous in the wholesale power over public officials and employees that it delivers into the hands of federal prosecutors, and that it is an invasion of legislative functions.

In short, defendant-appellee contends that the Government has effected a legal and social revolution, and that the panel has given its seal of approval to that revolution.*/ Moreover, even assuming that the Government's position were indeed the law, there are at least two compelling reasons why the Government's view of the Hobbs Act should not apply to the defendant-appellee at bar. First, given the thousands of

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*/ Reports in the media of the Government's reaction to the panel decision make clear the Government's awareness that the panel has provided it with a powerful new legal weapon.

federal, state and local public officials and employees who serve in fund raising capacities and could conceivably take a reprisal against someone who refused to make a contribution, we submit that it is a discriminatory prosecution to pick out one of those officials, Mr. Trotta, and apply the revolutionized Hobbs Act to him alone. See Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886). Second, we submit that to apply the changed Hobbs Act today to fund raising appeals made by this defendant-appellee in 1972 on behalf of the Republican Party, constitutes an ex post facto application of the Act.

We respectfully submit that the panel's decision, left standing, is a "sleeper", one about to be awakened by the Government -- a mischievous "engine of destruction" that will haunt us all. We importune the Court as a whole to re-examine that "engine", and if the Court is in agreement with defendant-appellee's position herein, we earnestly hope that the Court will judicially dismantle that "engine" before it runs us all down.

WHEREFORE, we respectfully petition on behalf of defendant-appellee for rehearing, and we suggest that the case be reheard by the Court of Appeals in banc, and we pray for such other and further relief as to the Court may seem just and proper.

Dated: Kew Gardens, New York
November 22, 1975

Respectfully submitted,

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